

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2013-015911

09/22/2015

HONORABLE KAREN A. MULLINS

CLERK OF THE COURT  
M. Scott  
Deputy

STUART SAUTER

ERIN SELENE IUNGERICH

v.

STRADA TOWNHOMES HOMEOWNERS  
ASSOCIATION

NIKITA VERMA PATEL

MINUTE ENTRY

The Court has considered Defendant's Motion for Summary Judgment, Defendant's Separate Statement of Facts in Support of Defendant's Motion for Summary Judgment, Affidavit [Lissa Johnson] in Support of Separate Statement of Facts in Support of Defendant's Motion for Summary Judgment, Plaintiff's Response to the Defendant's Motion for Summary Judgment, Plaintiff's Controverting Statement of Facts in Support of its Response to Defendant's Motion for Summary Judgment, and the oral argument of counsel.

The Verified Complaint alleges three causes of action: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) breach of A.R.S. §33-1804 and 1805. Defendant seeks summary judgment on all causes of action, and seeks partial summary judgment as to those causes of action that are time-barred.

**Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing**

The Court considers the breach of contract and breach of duty of good faith and fair dealing causes of action together, as the facts and law upon which the Court relies apply to both causes of action. Plaintiff is, and has been since March 30, 2004, a homeowner and member of Defendant Strada Townhomes Homeowners Association (the "Association"). In essence, Plaintiff alleges that the Association has breached the governing Declaration of Covenants, Conditions, and Restrictions ("CCRs") and the Bylaws for the Strada Townhomes in multiple

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2013-015911

09/22/2015

ways, causing him damage. These allegations include: abusing its discretion regarding the enforcement of violations of CCRs and Bylaws by other members; and failing to enforce and abide by the CCRs and Bylaw with respect to Board of Director meetings and records requests. The Association argues that under the CCRs applicable here, the Association's Board that has the legal discretion to decide what if any enforcement action should be taken for any particular alleged violation, and that a homeowner does not have the right to dictate how the Association enforces the Declaration, citing *Gfeller v. Scottsdale Vista North Townhomes Ass'n*, 193 Ariz. 52, 969 P.2d 658 (App. 1998). Thus, the Association moves that judgment be entered in its favor regarding Plaintiff's claims for breach of contract and breach of the implied covenant of good faith and fair dealing as a matter of law. In opposition, Plaintiff argues that the Association must act reasonably in the exercise of its discretionary powers, citing *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

Under the CCRs in issue here, the duly elected Board of Directors has the right to take any action on behalf of the Association. *Defendant's Separate Statement of Facts in Support of Defendant's Motion for Summary Judgment ("DSOF")*, Exhibit A, §6.2. The enforcement powers of the Board for violations of the CCRs, Bylaws, and Association Rules and Design Guidelines, include a variety of actions, such as assessing reasonable fines, suspending an owner's voting rights, suspending an owners right to use recreational facilities, suspending services, exercising self-help, requiring the removal of an improvement, towing vehicles, and filing a lawsuit. *Id.*, Exhibit A, §11.1(a)-(j). The CCRs further state:

The Association shall not be obligated to take any enforcement action if the Board determines, in its sole discretion, that because of the strength of the Associations, possible defenses, the time and expense of litigation or other enforcement action, the likelihood of a result favorable to the Association, or other facts deemed relevant by the Board, enforcement action would not be in the best interests of the Association.

*Id.*, Exhibit A, paras. following subpart j.

The Court finds that *Gfeller* does not resolve the issue at hand. In *Gfeller*, a homeowner alleged that his property flooded when an adjacent homeowner modified his property blocking the intended drainage. The homeowner sued his homeowner's association arguing that the association was legally obliged to enforce the CCR drainage provisions. The CCRs in issue in *Gfeller* provided that "these covenants, restrictions, reservations and conditions may be enforced by the Association or its Board of Directors, which shall have the right and duty to enforce the same..." and further provided that "[e]nforcements shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenant". *Gfeller*, 193 Ariz. at 53-54, 969 P.2d at 659-60. The Court of Appeals found that the foregoing language imposed an express duty on the Association to enforce all CCRs, with the option to do so through

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2013-015911

09/22/2015

proceedings in law or equity. *Id.*, 193 Ariz. at 54, 969 P.2d at 660. Here, however, the Association concedes that it has a general duty to enforce the CCRs, but argues that it alone chooses the method of enforcement.

*Tierra Ranchos Homeowners Ass'n* involved issues more analogous with those at hand. In that case, a homeowner challenged the decision of his homeowner's association denying approval of the location of a garage built on his property. The issue was what deference if any should be given to the association's discretionary decisions concerning whether the homeowner complied with the CCRs concerning improvements to his property. The Court held:

In determining the appropriate standard to apply, we begin with the proposition that Arizona courts look to the Restatement for guidance in the absence of controlling authority.

The Restatement (Third) of Property: Servitudes §6.13 (2000) specifically addresses the duties of a common-interest community association to its members. Among other duties, the Restatement imposes upon the association the duty to “treat members fairly” and the duty to “act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers[.]” *Id.* at §6.13(1)(b),(c). Under the Restatement approach, a member challenging an action of the association bears the burden of proving that the association breached its duty. *Id.* at §6.13(2). In addition, when the action is one within the association's discretion, the member bears “the additional burden of proving that the breach has caused, or threatens to cause, injury to the member individually or to the interests of the common-interest community.” *Id.*

The Restatement approach blends elements of the reasonableness rule and the business judgment rule. The purpose of imposing these burdens on the member is to protect “the collective decision-making processes of common-interest communities from second-guessing by the judiciary and to protect the community from the expenses of too-ready resort to litigation by disgruntled community members, while at the same time protecting individual members from improper management and imposition by those in control of the association.” *Id.* at cmt. a. As the comments indicate, “[t]he business-judgment rule [was] not adopted because the fit between community associations and other types of corporations is not very close, and it provides too little protection against careless or risky management of community property and financial affairs.” *Id.* at cmt. b. Nonetheless, unlike jurisdictions requiring the association to prove the reasonableness of its actions, the Restatement approach requires the member challenging the association to establish that its actions were unreasonable. *Id.* The

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2013-015911

09/22/2015

Restatement approach essentially “provide[s] the advantages of the business-judgment rule, but at less potential cost to the interests of individual members.”  
*Id.*

We find the Restatement approach to be well-reasoned and see no reason to adopt a different standard by which to review the discretionary decisions of a community association. [Internal citations omitted.]

*Tierra Ranchos*, 216 Ariz. at 201, 165 P.3d at 179.

*Tierra Ranchos* and the Restatement establish that in Arizona, the discretionary decisions of an association are subject to challenge by a member of the association and that such a member has the burden of establishing that the association’s actions were unreasonable. An association’s discretionary actions are not, as the Association here argues, subject to absolute and non-reviewable discretion.

Thus, the Association is not entitled to judgment as a matter of law based upon the argument that the Association’s Board that has the legal discretion to decide what if any enforcement action should be taken for any particular alleged violation; instead, such an action may be successfully challenged by this Plaintiff if he can demonstrate it was unreasonable. Because the Association does not argue that its actions were reasonable, but rather merely lists that it did in fact take actions to enforce the CCRs<sup>1</sup>, the Association is not entitled to summary judgment on Plaintiff’s first two causes of action, *i.e.* breach of contract and breach of duty of good faith and fair dealing.

**Breach of A.R.S. §33-1804, 1805**

Plaintiff alleges in his Third Claim for Relief that the Association violated A.R.S. §33-1804 by failing to hold an annual meeting in 2013. It is the understanding of the Court that Plaintiff has withdrawn this claim as to the 2013 meeting, and instead alleges that annual meetings were not held in 2006 and 2012. The Court finds that any claim based upon the failure to hold a Board meeting more than one year before the filing of the Complaint is time barred pursuant to A.R.S. §12-541(5). Thus, as to any alleged failure to hold an annual meeting in 2006, summary judgment is appropriate. The claim that an annual meeting was not held in 2012 is not time barred. Nonetheless, the Association did not offer facts regarding a 2012 meeting and Plaintiff offered facts that the meeting did not occur. *DSOF*, ¶8; *Plaintiff’s Controverting*

---

<sup>1</sup> Defendant’s Separate Statement of Facts in Support of Defendant’s Motion for Summary Judgment, ¶¶5, 6, and Exhibit C.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2013-015911

09/22/2015

*Statement of Facts in Support of its Response to Defendant's Motion for Summary Judgment* ("PSOF"), ¶23. Thus the Association is not entitled to summary judgment on this claim.

Plaintiff also alleges in his Third Claim for Relief that the Association failed to timely produce, or in some cases failed to respond, to his requests for Association records over a period of several years. The Court finds that any request for records predating December 4, 2012 are time-barred pursuant to A.R.S. §12-541(5). As to record requests within the one year period preceding this lawsuit, there are material issues of fact precluding the entry of summary judgment in favor of the Association. *PSOF*, ¶¶26-30; *DSOF*, ¶¶26-30. For the foregoing reasons,

**IT IS ORDERED** granting Defendant's Motion for Summary Judgment solely as to Plaintiff's Third Claim for Relief for the failure to hold a 2006 annual Board of Director's meeting and for the failure to produce Association records for record request predating December 4, 2012. As to Plaintiff's First and Second Claims for Relief, and as to Plaintiff's Third Claim for Relief alleging the failure to hold an annual Board of Director's meeting in 2012, the Motion is denied.

**IT IS FURTHER ORDERED** denying Defendant's request for an award of attorney's as to this Motion at this time, without prejudice.